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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 BANK OF AMERICA, N.A.

8 Plaintiff,

Case No. 2:16-cv-0409-KJD-BNW

ORDER

9 v.

10 HARTRIDGE HOMEOWNERS  
11 ASSOCIATION, *et al.*,

12 Defendants.

13 Presently before the Court is Plaintiff's Motion for Partial Summary Judgment (#51).  
14 Defendant Hartridge Homeowners Association ("Hartridge") filed a response in opposition (#56)  
15 as did Defendant Saticoy Bay, LLC series 5528 Meridian Rain ("Saticoy Bay") (#58) to which  
16 Plaintiff replied (#60/61).

17 Also before the Court is Defendant Hartridge Homeowners Association's Motion for  
18 Summary Judgment (#52) to which Defendant Absolute Collection Services, LLC filed a Joinder  
19 (#54). Bank of America filed a response in opposition (#59).

20 Finally, before the Court is Defendant Saticoy Bay's Motion for Summary Judgment  
21 (#53). Plaintiff Bank of America, N.A. ("BANA") filed a response in opposition (#57) to which  
22 Saticoy Bay replied (#62).

23 I. Facts

24 Donnalee E. Dugay ("Borrower") financed her property located at 5528 Meridian Rain  
25 Street, North Las Vegas, Nevada ("the Property") with a \$118,030 loan secured by a deed of  
26 trust. On or about July 7, 2014, the deed of trust was assigned to Plaintiff BANA.

27 The Property is subject to and governed by the Declaration of Covenants, Conditions and  
28 Restrictions and Grant of Easements ("CC&Rs") for Hartridge Homeowners Association.

1 Eventually, Borrower defaulted on her obligation to pay assessments of approximately \$76 per  
2 month under the CC&Rs to Hartridge. On October 30, 2013, Hartridge through its foreclosure  
3 agent, Defendant Absolute Collection Services (“ACS”), recorded notice of delinquent  
4 assessment lien. ACS recorded notice of default and election to sell on December 30, 2013. The  
5 notice stated that Borrower owed \$2,155.33 plus costs and fees without specifying which part  
6 was the superpriority lien.

7 On January 31, 2014, BANA’s counsel, Miles Bauer Bergstrom & Winters, LLP (“Miles  
8 Bauer”) offered to pay the superpriority lien and asked for a total. In response, ACS provided an  
9 account statement showing nine months of assessments and costs and fees totaling \$2,484.35.  
10 The statement did not indicate that they owed any maintenance or nuisance abatement charges.  
11 Based on the ledger, BANA calculated the superpriority amount as \$684.00 (nine months of  
12 assessments) and tendered that amount by check to ACS on March 13, 2014. ACS received and  
13 accepted the tender on behalf of Hartridge.

14 ACS proceeded with the foreclosure sale, because “ the Borrower and BANA failed to  
15 continue paying assessments [after ACS accepted the tender].” At the foreclosure sale, ACS  
16 circulated a bid sheet saying that the superpriority amount had been paid and the crier of the sale  
17 announced that the superpriority amount had been paid. Foreclosure sale was conducted on June  
18 17, 2014 and the foreclosure deed was recorded on June 19, 2014. Saticoy Bay purchased the  
19 property for \$10,100.00. The parties now disagree as to whether Hartridge’s foreclosure  
20 extinguished BANA’s lien or whether Saticoy Bay purchased the property subject to the lien.

## 21 II. Standard for Summary Judgment

22 The purpose of summary judgment is to avoid unnecessary trials by disposing of  
23 factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986);  
24 Nw. Motorcycle Ass’n v. U.S. Dept. of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). It is available  
25 only where the absence of material fact allows the Court to rule as a matter of law. Fed. R. Civ.  
26 P. 56(a); Celotex, 477 U.S. at 322. Rule 56 outlines a burden shifting approach to summary  
27 judgment. First, the moving party must demonstrate the absence of a genuine issue of material  
28 fact. The burden then shifts to the nonmoving party to produce specific evidence of a genuine

1 factual dispute for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587  
2 (1986). A genuine issue of fact exists where the evidence could allow “a reasonable jury [to]  
3 return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
4 (1986). The Court views the evidence and draws all available inferences in the light most  
5 favorable to the nonmoving party. Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d  
6 1100, 1103 (9th Cir. 1986). Yet, to survive summary judgment, the nonmoving party must show  
7 more than “some metaphysical doubt as to the material facts.” Matsushita, 475 U.S. at 586.

### 8 III. Analysis

9 Bank of America argues that its deed of trust survived Hartridge’s nonjudicial foreclosure  
10 for four discrete reasons: (1) the bank tendered the superpriority portion of the HOA lien; (2) the  
11 association foreclosed under an unconstitutional version of NRS § 116 and violated due process  
12 as-applied; (3) the Supremacy Clause preempts NRS § 116; and (4) the sale was unfair and  
13 should be equitably set aside under Shadow Canyon. Because the Court finds Bank of America’s  
14 tender argument dispositive, it need not reach the bank’s other arguments. Hartridge and Saticoy  
15 Bay, on the other hand, move for summary judgment on their quiet title claims. Saticoy Bay  
16 seeks a declaration that Hartridge’s foreclosure extinguished both BANA’s and Borrower’s  
17 interest in the property.

#### 18 A. Tender

19 BANA argues that its tender of the superpriority portion of Hartridge’s lien before the  
20 association’s foreclosure preserved its deed of trust from extinguishment. The bank’s argument  
21 hinges on the check that Miles Bauer sent ACS after receiving the association’s notice of  
22 foreclosure. In response to that notice, Miles Bauer contacted ACS and requested the  
23 superpriority balance and offered to pay whatever that balance was. ACS responded with an  
24 account statement that itemized all the outstanding fees on the property’s account. From that  
25 statement, Miles Bauer calculated nine months of association assessments and remitted ACS a  
26 check for that amount, \$684.00. ACS accepted the tender and foreclosed on the subpriority lien  
27 making it clear at the sale that the superpriority lien had been satisfied.

1           The Nevada Supreme Court has confirmed that a party’s valid tender before foreclosure  
2 discharges an association’s superpriority lien and voids the foreclosure as to the tendering party’s  
3 deed of trust. Bank of America, N.A. v. SFR Invs. Pool 1, LLC, 427 P.3d 113, 121 (Nev. 2018)  
4 (“Diamond Spur”). Tender is “valid” if it is payment in full and unconditional, or with conditions  
5 that the tendering party has a right to request. Id. at 117–118. Diamond Spur presented facts  
6 nearly identical to these. There, Bank of America calculated nine months of assessments and  
7 tendered a check for that amount before foreclosure. The bank’s letter<sup>1</sup> to the association  
8 accompanying its tender included certain conditions, including a “paid-in-full” condition,  
9 whereby the association’s acceptance of tender would satisfy all of the bank’s financial  
10 obligations to the association. Id. at 118. Unlike the present case, the association rejected the  
11 check and foreclosed. The association argued that the bank’s tender was incomplete because it  
12 did not include payment for nuisance and abatement fees and that the tender was impermissibly  
13 conditional due to the paid-in-full language in the tender letter. Id. at 117–18.

14           The Nevada Supreme Court disagreed. It found that the bank’s tender was both “in-full”  
15 and not impermissibly conditional. Payment in full, according to NRS § 116.3115, includes nine  
16 months of unpaid assessments and nuisance and abatement fees, if such fees exist. Id. at 117.  
17 Because there was no evidence that Bank of America owed nuisance and abatement fees, its  
18 tender of nine months’ unpaid assessments constituted payment in full. Id. Likewise the tender  
19 was not impermissibly conditional because Bank of America had a right to insist upon the  
20 conditions it included in its tender. By tendering payment prior to the foreclosure, the bank  
21 voided the association’s foreclosure as to the superpriority lien. The association, therefore, could  
22 not convey the property free from Bank of America’s deed of trust, and any subsequent  
23 purchaser took its interest subject to the bank’s. Id. at 121.

24           The facts here are extremely similar to Diamond Spur, and the result is the same. Miles  
25 Bauer tendered the entire superpriority balance two years before Hartridge’s foreclosure. As  
26 Diamond Spur made clear, the superpriority portion only includes up to nine months’

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28           <sup>1</sup> Miles Bauer’s letter in Diamond Spur was extremely similar, if not identical, to the letter that it sent in the present action.

1 assessments plus nuisance or abatement charges. There is no evidence that BANA owed  
2 nuisance or abatement fees here, so its failure to tender nuisance and abatement fees does not  
3 make its tender incomplete. BANA's tender alone preserved its deed of trust. Coupled with  
4 ACS's acceptance and declaration that the superpriority lien had been satisfied, Hartridge could  
5 not convey the property free of the bank's deed of trust. Therefore, Saticoy Bay took its interest  
6 subject to BANA's.

7 Defendants argue that equity favors them when considering BANA's tender. However,  
8 equity is not in consideration when deciding whether the sale is void, because the lien was  
9 satisfied by BANA's tender. See, e.g., Diamond Spur, 427 P.3d at 120-21 (Nevada Supreme  
10 Court did not balance equities). Saticoy Bay argues that BANA's tender did not preserve its deed  
11 of trust for several reasons, none of which are persuasive in light of Diamond Spur.

12 First, Saticoy Bay argues that Miles Bauer's tender did not discharge Hartridge's lien  
13 because (1) the tender assigned an interest in BANA, which subordinated the bank's interest to  
14 the association's and required recording; (2) the tender was impermissibly conditional; and (3)  
15 the association's rejection was in good faith. The Nevada Supreme Court has explicitly rejected  
16 Saticoy Bay's first two arguments, and the third has no basis in fact, because the tender was  
17 accepted, not rejected.

18 Tender of a superpriority lien does not operate as an assignment, nor does it subrogate the  
19 rights of the tendering party to the rights of the association. Diamond Spur, 427 P.3d at 119  
20 citing NRS § 111.315. Tender of the superpriority lien "does not alienate, create, assign, or  
21 surrender an interest in land." Id. at 119. It *preserves* a pre-existing interest, which allows the  
22 holder of the deed of trust to protect its legitimate interest and avoid foreclosure. Id. at 119–20.  
23 Because tender is not an assignment of land, tender of the superpriority lien does not subrogate  
24 the bank's interest to the association's interest. Similarly, because tender does not "alienate,  
25 create, assign, or surrender" a property interest, the tendering party need not record its tender or  
26 keep it good. Id. To the contrary, "after tendering the superpriority portion of an HOA lien to  
27 preserve its interest as first deed of trust holder . . . a party need only be ready and willing to pay  
28 to keep the tender good." Id. at 121. It follows that § 116 does not require payment in cashier's

1 check or other guaranteed funds. See id. at 120–21, Chinatown St. Tr. v. Bank of America, N.A.,  
2 No. 74545-COA, 2018 WL 6609590 (Nev. Ct. App. Dec. 7, 2018).

3 To the extent that Saticoy Bay absurdly suggests that the Nevada Supreme Court is  
4 wrong about its pronouncement of what the law is regarding equitable subrogation, this Court is  
5 unable to provide a remedy even if Saticoy Bay was right. This Court is bound by the Nevada  
6 Supreme Court’s interpretation of the applicability of equitable subrogation as it relates to NRS  
7 § 116. See Ticknor v. Choice Hotels Intern., Inc., 265 F.3d 931, 939 (9th Cir. 2001).

8 Accordingly, the Court rejects Saticoy Bay’s argument that equitable subrogation prevented  
9 BANA from preserving its deed of trust through valid tender.

10 Likewise, the conditions included in Miles Bauer’s letter did not invalidate its tender. A  
11 tendering party may only include conditions that it has a right to insist upon. Diamond Spur, 427  
12 P.3d at 118. Acceptable conditions are limited to “receipt of full payment or a surrender of the  
13 obligation.” Id. at 118 citing Heath v. L.E. Schwartz & Sons, Inc., 416 S.E.2d 113, 114–15 (Ga.  
14 App. 1992). Here, Saticoy Bay takes issue with Miles Bauer’s payment-in-full language and  
15 other alleged “false statements” in the tender letter. For example, Miles Bauer’s letter excerpted  
16 several sections of NRS § 116 rather than quote the entire subsection of the statute. The letter  
17 then states that the association’s acceptance of tender would be “an unconditional acceptance on  
18 [the association’s] part of the facts state [t]herein.” Saticoy Bay argues that accepting tender  
19 would mean it agreed with Miles Bauer’s incomplete statements of the law, which it did not.  
20 However, none of the “false statements” that Saticoy Bay disputes were conditions of its  
21 acceptance. They were merely excerpted statements of law or fact. The only condition included  
22 in Miles Bauer’s letter was the paid-in-full condition that cured the bank’s financial obligations  
23 to the association. Diamond Spur explicitly allowed such a condition. Therefore, Miles Bauer’s  
24 tender letter was not impermissibly conditional.

25 In sum, BANA’s deed of trust survived Hartridge’s foreclosure sale because the bank’s  
26 tender cured the superpriority lien balance before foreclosure. The sale was expressly made on  
27 the subpriority lien. Therefore, SFR acquired the property subject to BANA’s existing deed of  
28

1 trust. The Court, therefore, grants Plaintiff Bank of America's motion and declares that its deed  
2 of trust still encumbers the property.<sup>2</sup>

3 B. Saticoy Bay's Counterclaims

4 Saticoy Bay filed counterclaims seeking to quiet title against BANA. Having found that  
5 BANA's tender cured the superpriority lien before Hartridge's foreclosure sale, Saticoy Bay  
6 purchased the property subject to BANA's lien. Accordingly, Saticoy Bay's claims for relief  
7 must be dismissed with prejudice.

8 C. BANA's Remaining Wrongful Foreclosure and Breach of NRS § 116 Claims

9 After granting BANA's motion and finding that its deed of trust survived Hartridge's  
10 foreclosure, only BANA's claims for wrongful foreclosure and breach of NRS § 116 against  
11 ACS and Hartridge and the bank's injunction claim against Saticoy Bay remain. As for BANA's  
12 wrongful foreclosure and breach of NRS § 116 claims, the bank pleaded those claims in the  
13 alternative to its quiet title and declaratory relief claims. Because the Court has granted judgment  
14 on the bank's quiet title claim, it need not consider alternative claims. Accordingly, BANA's  
15 wrongful foreclosure and breach of NRS § 116 claims against Hartridge and ACS are dismissed.

16 Likewise, the Court dismisses BANA's injunctive relief claim against Saticoy Bay.  
17 Although styled as a stand-alone cause of action here, an injunction is a remedy. See Jensen v.  
18 Quality Loan Svc. Corp., 702 F.Supp.2d 1183, 1201 (E.D. Cal. 2010); In re Wal-Mart Wage and  
19 Hour Emp't Practices Litig., 490 F.Supp.2d 1091, 1130 (D. Nev. 2007). Additionally, an  
20 injunction at this point is unnecessary. The Court has already quieted title and provided the  
21 declaratory relief the bank sought. Therefore, the Court dismisses BANA's injunctive relief  
22 claim against Saticoy Bay.

23 IV. Conclusion

24 Accordingly, IT IS HEREBY ORDERED that Plaintiff/Counterdefendant Bank of  
25 America, N.A.'s Motion for Partial Summary Judgment (#51) is **GRANTED**. The Court  
26 declares that BANA's deed of trust in the property located at 5528 Meridian Rain Street, North

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28 <sup>2</sup> Because the Court grants Plaintiff's motion for summary judgment on its claim that it validly tendered an  
amount to satisfy the superpriority lien and grants the motion, it is unnecessary to reach the other grounds cited in its  
motion for summary judgment.

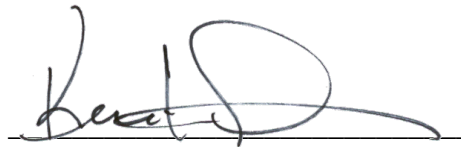
1 Las Vegas, Nevada survived Hartridge Homeowners Association's nonjudicial foreclosure. The  
2 Court also declares that whatever interest Defendant Saticoy Bay, LLC series 5528 Meridian  
3 Rain acquired in the property it takes subject to Plaintiff's first deed of trust.

4 IT IS FURTHER ORDERED that Defendant Hartridge Homeowners Association's  
5 Motion for Summary Judgment (#52) is **DENIED as moot**;

6 IT IS FURTHER ORDERED that Defendant Saticoy Bay, LLC's Motion for Summary  
7 Judgment (#53) is **DENIED**;

8 IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for  
9 Plaintiff/Counterdefendant and against Defendants Hartridge Homeowners Association,  
10 Absolute Collection Services, and Defendant/Counterclaimant Saticoy Bay, LLC series 5528  
11 Meridian Rain.

12 Dated this 30<sup>th</sup> day of September, 2019.

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15 Kent J. Dawson  
16 United States District Judge  
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